A

Goh Hock Hai v EON Bank Bhd

B

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–66 OF 2001
ZAKARIA SAM J
26 OCTOBER 2010

C

Banking — Banker and customer — Authorisation — Current account — Whether bank debited account with customer's authority — Whether claim brought within 21 days from date of bank's statement

D

Banking — Banker and customer — Claim for amount outstanding under banking facility — Whether undisputed certificate of indebtedness and statements of accounts were conclusive evidence of customer's liability to bank

E

Civil Procedure — Counterclaim — Whether properly brought — Plaintiff claiming against bank for alleged unauthorised transactions in his current account — Bank counterclaiming for recovery of outstanding balance under overdraft and term loan facilities — Whether defendant's counterclaim a charge action — Whether defendant entitled to bring counterclaim against plaintiff to avoid multiplicity of actions — Rules of the High Court 1980 O 15 r 2 & O 83 r 1(1)

F

Evidence — Adverse inference — Failure to call material witness — Allegation by plaintiff that signature on letters falsified — Failure to call expert witness — Whether adverse inference ought to be drawn against plaintiff — Evidence Act 1950 s 114(g)

G

Evidence — Documentary evidence — Forgery of document — Denial of execution of document — Allegation by plaintiff that his signature on letters was falsified — Failure of plaintiff to call expert witness — Plaintiff's secretary testifying that signature looked like plaintiff's signature — Defendant's expert witness confirming that signature was plaintiff's — Whether forgery proven

H

Evidence — Relevancy — Relevancy of facts — Opinion as to handwriting — Allegation by plaintiff that his signature on letters was falsified — Whether plaintiff's secretary's evidence that signature looked like plaintiff's signature admissible — Evidence Act 1950 s 47

I

The defendant had acquired the entire banking business of Oriental Bank Bhd ('the bank'). The plaintiff had maintained two accounts, ie account No

152–20981–09 ('personal account') and account No 151–01627–08 ('company account') under the name of Handee Engineering & Consultancy Services Sdn Bhd ('Handee') with the bank. The plaintiff was a director and shareholder of Handee. The plaintiff claimed against the defendant for alleged unauthorised transactions from the plaintiff's personal account into Handee's company account in respect of a sum of RM3,277,122.92 on 31 December 1996, and a sum of RM1,484,236.56 on 4 January 1997. The bank alleged that the two transfers were carried out pursuant to plaintiff's verbal instructions, which instructions were subsequently confirmed by the plaintiff vide his letters ('exhs D1 and D2') to the bank. As reflected in his passport, the plaintiff said that on 31 December 1996 he was overseas. The plaintiff claimed that he did not sign exhs D1 and D2. The bank also relied on its general terms and conditions governing the plaintiff personal account and sought to avoid liability under cl 9 which disentitled the plaintiff from making any claim against the bank, unless the claim was brought within 21 days from the date of the bank's statement. The defendant on the other hand counterclaimed against the plaintiff for the recovery of the outstanding balance due under the overdraft and term loan facilities granted to the plaintiff. The plaintiff contended that the defendant's counterclaim was a charge action within O 83 r 1(1) of the Rules of the High Court 1980 ('RHC') and that there should only be a claim for any deficiency arising from the proceeds of sale.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim with costs:

(1) The plaintiff, having signed the application form dated 12 October 1993 was bound by the terms and conditions. Clause 9 is a standard and common stipulation amongst all banking institutions. The plaintiff's complaint of the alleged unauthorised transfers occurred only some 3 1/2 years later. The plaintiff's complaint was without basis (see paras 14, 15 & 17).

(2) The defendant's forensic document analyst concluded that the plaintiff had signed the letters ie exhs D1 and D2. The plaintiff on the other hand had not tendered any report by their forensic examiner and this attracted the application of a adverse inference under s 114(g) of the Evidence Act 1950 ('Act'). Further the plaintiff's secretary testified that the signatures on exhs D1 and D2 looked like the plaintiff's signature. SP2 had testified that she was familiar with the plaintiff's signature, being his secretary, and her evidence on the said letters was admissible under s 47 of the Act (see paras 19, 32 & 34–35).

(3) The plaintiff had on several occasions prior to the said transfers, given instructions to the bank in a manner similar to the instructions leading to the said transfers, ie transfer from the plaintiff's personal account to the accounts of companies associated with the plaintiff, including Handee's,

via verbal instructions to the bank and subsequently confirmed by letters issued by the plaintiff to the bank. The practice or convention, which had been mutually accepted, estopped the plaintiff from denying having issued the verbal instruction and the said exhs D1 and D2 (see paras 37 & 39).

(4) Further, since the plaintiff did not notify the bank of the alleged unauthorised debits within 21 days of the date of the statement of account as required under cl 9, the plaintiff was estopped from denying having authorised the said transfers. The plaintiff was deemed to have waived his rights to do so (see para 41).

(5) The defendant was entitled to bring the counterclaim against the plaintiff in the proceedings herein having regard to O 15 r 2 of the RHC and in order to avoid multiplicity or circuitry of suits (see para 52).

(6) The plaintiff had acknowledged in cross-examination that he had in 1999 failed to settle the outstanding in respect of the overdraft facility and the monthly installments despite several requests and reminders. The plaintiff also had not raised any doubt as to the veracity of the certificate of indebtedness and the statement of accounts. The plaintiff was bound by section 15.15 of the facilities agreement in respect of the certificate of indebtedness. The said certificate and the statements of accounts stood undisputed and were conclusive evidence of the plaintiff's liability for the sums as claimed (see paras 56 & 65–66).

[Bahasa Malaysia summary

Defendan telah memperolehi keseluruhan perniagaan perbankan Oriental Bank Bhd ('bank'). Plaintif telah mengekalkan dua akaun iaitu akaun No 152–20981–09 ('akaun peribadi') dan akaun No 151–01627–08 ('akaun syarikat') di bawah nama Handee Engineering & Consultancy Services Sdn Bhd ('Handee') dengan bank. Plaintif adalah pengarah dan pemegang saham Handee. Plaintif mendakwa terhadap defendan untuk dakwaan transaksi yang tidak dibenarkan daripada akaun peribadi plaintif kepada akaun syarikat Handee berkenaan jumlah sebanyak RM3,277,122.92 pada 31 Disember 1996, dan sejumlah wang sebanyak RM1,484,236.56 pada 4 Januari 1997. Bank mendakwa bahawa kedua-dua transaksi tersebut dilakukan berikutan arahan lisan plaintif, arahan-arahan yang mana kemudiannya disahkan oleh plaintif melalui surat-suratnya ('lampiran D1 dan D2') kepada bank. Seperti yang digambarkan di dalam pasportnya, plaintif menyatakan bahawa pada 31 Disember 1996 dia berada di luar negara. Plaintif mendakwa bahawa dia tidak menandatangani lampiran D1 dan D2. Bank juga bergantung atas terma-terma dan syarat-syarat amnya yang mengawal akaun peribadi plaintif dan memohon untuk mengelak liabiliti di bawah klausa 9 yang tidak membenarkan plaintif daripada membuat apa-apa tuntutan terhadap bank, kecuali tuntutan dikemukakan dalam masa 21 hari dari tarikh penyata bank.

Defendan sebaliknya menuntut balasan terhadap plaintif untuk mendapatkan kembali baki yang belum dijelaskan di bawah overdraf dan kemudahan pinjaman jangka masa yang diberikan kepada plaintif. Plaintif berhujah bahawa tuntutan balas defendan adalah tindakan caj dalam A 83 k 1(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan ia sepatutnya hanya terdapat tuntutan untuk apa-apa kekurangan yang berbangkitnya daripada keuntungan jualan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan dengan kos:

(1) Plaintif, setelah menandatangani borang permohonan bertarikh 12 Oktober 1993 adalah terikat dengan terma-terma dan syarat-syarat. Klausa 9 ialah ketetapan standard dan biasa di antara kesemua institusi perbankan. Aduan plaintif mengenai dakwaan pemindahan yang tidak dibenarkan berlaku hanya 3 1/4 tahun kemudiannya. Aduan plaintif adalah tanpa asas (lihat perenggan 19, 32 & 34–35).

(2) Penganalisis dokumen forensik defendan menyimpulkan bahawa plaintif telah menandatangani surat-surat tersebut iaitu lampiran D1 dan D2. Plaintif sebaliknya tidak menyerahkan apa-apa laporan oleh pemeriksa forensik mereka dan ini mengakibatkan permohonan inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 ('Akta'). Selanjutnya setiausaha plaintif memberi keterangan bahawa tandatangan-tandatangan di atas lampiran D1 dan D2 dilihat seperti tandatangan plaintif. SP2 memberi keterangan bahawa dia tahu benar dengan tandatangan plaintif, sebagai setiausahanya, dan keterangannya mengenai surat-surat tersebut boleh diterima di bawah s 47 Akta (lihat perenggan 19, 32 & 34–35).

(3) Plaintif telah atas beberapa keadaan sebelum pemindahan tersebut, memberi arahan kepada bank dalam cara sama kepada arahan-arahan yang membawa kepada pemindahan-pemindahan tersebut, iaitu pemindahan daripada akaun peribadi plaintif kepada akaun-akaun syarikat bersekutu dengan plaintif, termasuk Handee, melalui arahan-arahan lisan kepada bank dan kemudiannya disahkan oleh surat-surat yang dikeluarkan oleh plaintif kepada bank. Praktis atau kelaziman, yang diterima secara bersama, estop plaintif daripada menafikan memberikan arahan lisan tersebut dan lampiran D1 dan D2 tersebut (lihat perenggan 37 & 39).

(4) Selanjutnya, memandangkan plaintif tidak memberitahu bank mengenai debit-debit yang tidak dibenarkan dalam masa 21 hari dari tarikh penyata akaun seperti yang dikehendaki di bawah klausa 9, plaintif diestop daripada menafikan memberi kebenaran pemindahan-pemindahan tersebut. Plaintif dianggap mengetepikan haknya untuk berbuat demikian (lihat perenggan 41).

(5) Defendan berhak untuk mengemukakan tuntutan balas terhadap plaintif di dalam prosiding ini mengambilkira A 15 k 2 KMT dan supaya dapat mengelak tindakan-tindakan yang berganda atau serupa (lihat perenggan 52).

(6) Plaintif telah mengakui di dalam pemeriksaan balas bahawa dia pada tahun 1999 gagal menyelesaikan jumlah yang belum dijelaskan berkenaan kemudahan overdraf dan bayaran ansuran bulanan walaupun terdapat beberapa permintaan dan peringatan. Plaintif juga tidak membangkitkan apa-apa kesangsian terhadap kebenaran sijil keberhutangan dan penyata akaun. Plaintif terikat dengan seksyen 15.15 Perjanjian Kemudahan berkenaan sijil keberhutangan. Sijil tersebut dan penyata-penyata akaun tidak dipertikaikan dan keterangan konklusif terhadap liabiliti plaintif untuk jumlah-jumlah yang dituntut (lihat perenggan 56 & 65–66).]

Notes

For cases on authorisation, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1805–1806.

For cases on claim for amount outstanding under banking facility, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1809–1813.

For cases on counterclaim generally, see 2 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2451–2461.

For cases on failure to call material witness, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 185–201.

For cases on forgery of document, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1301–1303.

For cases on relevancy generally, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2358–2370.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)

Chai Then Song v Malayan United Finance Bhd [1993] MLJU 128; [1993] 2 CLJ 640, HC (refd)

Chan Boi Loi v Public Bank Berhad [2009] MLJU 733; [2009] 6 CLJ 81, FC (refd)

Danaharta Urus Sdn Bhd lwn Zabia Sdn Bhd & 4 yang lain [2009] 1 LNS 1212, HC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Krishnamurthy & Anor v Malaysian Finance Corporation Bhd [1986] 2 MLJ 134, SC (refd)

Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd [2004] 4 CLJ 18, CA (refd)

Ngui Yu Thau v Wong Mu Khyun & Ors [2003] MLJU 106; [2003] 6 CLJ 273, HC (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157; [1985] CLJ (Rep) 242, FC (refd)

Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors [1994] 1 MLJ 495; [1994] 2 CLJ 646, HC (refd)

Republic of India and another appellants v India Steamship Co Ltd (No 2) [1998] AC 878, HL (refd)

Legislation referred to

Evidence Act 1950 ss 47, 114(g)
Rules of the High Court 1980 O 15 r 2, O 83 r 1(1)

JJ Chan (Nga Mei Yen with him) (Shearn Delamore & Co) for the plaintiff.
Tan Beng Hong (Ooi Teik Hoe with him) (Tan Beng Hong & Co) for the defendant.

Zakaria Sam J:

BACKGROUND

[1] The defendant had by an acquisition agreement dated 30 June 2000, acquired the entire banking business of Oriental Bank Bhd ('the bank') pursuant to the order of the High Court dated 5 December 2000 under Kuala Lumpur High Court ex parte Originating Summons No D9–24–303 of 2000.

[2] The plaintiff had maintained two accounts, ie personal current account No 152–20981–09 ('the personal account'), and a company account No 151–01627–08 under the name of Handee Engineering & Consultancy Services Sdn Bhd ('Handee's account') with the bank, at Jalan Anson, Pulau Pinang branch.

[3] The plaintiff is a director and a shareholder of Handee, Engineering & Consultancy Services Sdn Bhd ('Handee').

THE PLAINTIFF'S CLAIM

[4] The plaintiff's claim against the defendant is for the alleged unauthorised transactions from the plaintiff's personal account into Handee's account in respect of a sum of RM3,277,122.92 on 31 December 1996, and a sum of RM1,484,236.56 on 4 January 1997. As reflected in his passport (exh P6), the plaintiff said that on 31 December 1996 he was overseas and had just returned home in the late afternoon of 2 January 1997.

[5] The plaintiff claims that he did not sign the letters dated 31 December 1996 (exh D1) and 3 January 1996 (exh D2), addressed to the bank authorising the said transfers.

[6] On 1 July 2000 the plaintiff's solicitors issued a demand for the return of RM4,761,359.48 which the defendant refused to comply.

THE DEFENCE

[7] The bank alleges that the two transfers were carried out pursuant to the plaintiff's verbal instructions (see debit notes/address in exhs P4 and P5) which instructions were subsequently confirmed by the plaintiff vide his letters (exhs D1 and D2) to the bank. According to the bank, the two transfers were effected in order to settle part of the trust receipts and bankers acceptance facility granted by the defendant to Handee.

[8] The bank also relies on its general terms and conditions governing the plaintiff's personal account and seeks to avoid liability under cl 9 which disentitled the plaintiff from making any claim against the bank, unless the claim was brought within 21 days from the date of the bank's statement.

THE COUNTERCLAIM

[9] The defendant's counterclaim (under O 15 r 2 of the RHC 1980) against the plaintiff is for the recovery of the outstanding balance of RM2,857,755.27 due under the overdraft facility and RM942,606.84 under the term loan, granted to the plaintiff in the aggregate sum of RM4,168,161.49.

FINDINGS

Was the plaintiff bound by the cll 9 and 14 of the bank's terms and conditions governing the plaintiff's account

[10] Learned counsel for the plaintiff argued that the bank offered no evidence that cll 9 and 14 of the terms and conditions had been brought fairly and reasonably to the plaintiff's attendance or that a copy containing the bank's term and condition had been given to the plaintiff to read before he signed the application form to open the account.

[11] This is an attempt by the plaintiff to deny knowledge of the terms and conditions governing his personal account or that he had received such a copy from the bank and thus then implication and effects.

[12] The application form to open the personal account which the plaintiff had signed together with the terms and conditions governing current/cheque accounts (at bundle B, pp 1–4) is part of the agreed documents and had been agreed in their entirety.

[13] Clause 5 of the application form (at p 2 of bundle B) reads as follow:

> By signing below, I/we:
>
> (i) confirm that I/we have received a copy of your general terms and conditions governing the account (s) which I/we are now opening.
>
> (ii) agree to be bound by all the provisions of the same terms and conditions for any account which I am/we are now opening …

[14] The plaintiff, having signed the application form dated 12 October 1993 bound by the terms and conditions.

[15] Clauses 9 and 14 (at pp 4 of bundle B) are standard and common stipulations amongst all banking institutions:

> 9. Statement
>
> A statement of balances on my/our account(s) will be rendered only once a month. If, however, there are no transactions during the month, no statement will be rendered.
>
> I/We agree to examine each statement of account received from the Bank and to notify the Bank within twenty-one (21) days from the date of the statement of any errors, irregularities, discrepancies, claims or unauthorised debits or items whether made, processed or paid out as a result of forgery, fraud, lack of authority, negligence or otherwise by any person whatsoever, failing which no liability of any form will be attached to the Bank relating thereto.
>
> 14. Limitation of Liability
>
> The Bank shall not be responsible for and I/we shall fully indemnity the Bank and hold the Bank harmless against all losses, costs, and expenses which may be incurred by me/us or by the Bank in connection with any or all of the accounts whatsoever of the Bank's execution of any instructions (notwithstanding such instructions may be fraudulent or unauthorised) on if any of my/our accounts or any part thereof is reduced or frozen by any government or official authority.

[16] It is incredulous for the plaintiff to contend that the terms and conditions, ie cl 9 are onerous and unusual, more so when the plaintiff is an experienced businessman, company director and shareholder.

[17] It is significant to note that the plaintiff's complaint of the alleged

A unauthorised transfers occurred only some 3 1/2 years later (see the plaintiff's solicitors letter dated 1 July 2000 at p 158 of the agreed bundle), that too following the bank's letter dated 5 June 2000 (exh D13) wherein the plaintiff was given time until 30 November 2000 to fully settle the entire outstanding amount owing by him to the bank.

B

[18] In conclusion, the plaintiff's complaint is without basis.

INSTRUCTIONS AUTHORISING THE TRANSFERS

C

[19] SD1, the defendant's current branch manager, testified that the said two transfers were effected by the bank pursuant to the plaintiff's verbal instructions as shown in the debit note/advise dated 31 December 1996 (exh P4) in respect of the transfer of a sum of RM3,277,122.92 from the plaintiff's personal account to Handee's account and debit note/advise dated 3 Janury 1997 (exh P5) in respect of the transfer of a sum of RM1,484,236.56 from the plaintiff's personal account to Handee's account. This was supported by the plaintiff's letters of instruction dated 31 December 1996 (exh D1) and 3 January 1996 (exh D2) to the bank confirming the said transfers, which, according to the defendant's forensic document analyst ('SD3'), bears the signatures of the plaintiff (which topic I will discuss later).

D

E

[20] Exhibits D1 and D2 coincides and contemporaneous with Handee's letters dated 31 December 1996 (exh D16) and 3 January 1997 (exh D17) which were signed by the plaintiff instructing the bank to debit Handee's current account for settlement of several trust receipts and bankers acceptance ('the trust receipts').

F

[21] SD1 had testified that from the bank's statement in respect of the trust receipts, the debit notes/advise, and also Handee's bank statement of account, Handee's instructions to debit their current account for settlement of several trust receipts had been effected for the sums of RM3,277,122.92 and RM1,484,236.56, transferred from the plaintiff's personal account to Handee's account — see exhs D20, D21, D22, D23, D18A and D18B.

G

H

[22] It is to be noted that no queries or disputes whatsoever had been raised by Handee, of which the plaintiff is a director and shareholder, in respect of the credited sums of RM3,277,122.92 and RM1,484,236.56 transferred from the plaintiff's personal account, and the same sums as debited for the settlement of several trust receipts.

I

[23] It is significant to note as well that Handee's letter of instruction to the bank dated 31 December 1996 (exh D16) to debit their current account for settlement of several trust receipts was in fact signed by the plaintiff (and

another director), a fact which the plaintiff had conceded in cross-examination (although claiming that he could not remember when he had signed the said letter) and that he had signed the letter because he was asked to do so by Handee.

[24] The plaintiff, having signed the letter dated 31 December 1996 (exh D16) is bound by it and is to take responsibility for it. In *Chai Then Song v Malayan United Finance Bhd* [1993] MLJU 128; [1993] 2 CLJ 640 James Foong J (now FCJ) held that (at p 643):

> To sum up on this point, it is good to repeat Lord Peason's judgment in *Gallie v Lee* of an example of a busy managing director who has a pile of documents to be signed in a few minutes before the next meeting and, his secretary arranges them for maximum speed with only the spaces for signature exposed, and the managing director signs them 'blind'. To this Lord Peason comments that he may be exercising a wise economy of time and energy:
>
> ... but the person who signs the documents in this way ought to be held bound by them, and ought not be entitled to avoid liability so as to shift the burden of loss on an innocent third party. The whole object of having documents signed by him is that he makes them his documents and takes responsibility for them.

[25] In *Public Finance Bhd v Lee Bee Rubber Factory Sdn Bhd & Ors* [1994] 1 MLJ 495; [1994] 2 CLJ 646, Edgar Joseph Jr SCJ had this to say (at p 505 (MLJ); p 652 (CLJ)):

> In other words, as directors and shareholders of the defendant company, it was their duty to know the nature and effect of the documents they were signing and thus it is impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee agreement or that there had been any misrepresentation, albeit innocent, on the part of the plaintiff company.

EVIDENCE OF HANDWRITING EXPERT

[26] In view of the challenge made by the plaintiff that he had not signed the said letters ie exhs D1 and D2, the defendant had called Mr Siow Kwen Sia ('SD3'), a forensic document analyst to testify as to the validity of the plaintiff's challenge of the signatures on the said letters.

[27] SD3 has been practicing as a forensic document analyst for the past 23 years, and had examined over 3,050 questioned signatures and/or handwritings. He had also worked in Jabatan Kimia Malaysia for 13 years as a forensic chemist. I have no doubt about his expertise.

[28] The detail analysis of his examination of the questioned signatures herein has been tendered and marked exh D30.

[29] For the purpose of determining the authorship of the questioned signatures, the originals of 11 documents containing the plaintiff's signatures during the period from 1993–1997 (exhs D3, D4, D5, D7A–C, D8A–E — 'the specimen signature') together with the originals of the said letters ie (exhs D1–D2 — 'the questioned signatures') were examined by SD3. SD3 had concluded that in the light of some 73 points of similarities, which include similar variations in features and 16–17 similarities of writing movement, and the absence of fundamental differences, the plaintiff had signed the letters ie exhs D1–D2.

[30] According to SD3, his finding of 73 points of similarities is the highest in his 23 years of practice, and that the plaintiff is 'definitely the same person' who had signed exhs D1–D2.

[31] Attempts by the plaintiff's counsel to challenge the expert evidence of SD3 in cross-examination, failed. I found there is no reason why his findings should not be accepted.

[32] Although the same specimen signatures together with the originals of exhs D1–D2 had been forwarded to the plaintiff's solicitors at their request and indeed sent to their handwriting and forensic examiner in Singapore for examination, the plaintiff had not tendered any report by their forensic examiner. This attracts the application of adverse inference under s 114(g) of the Evidence Act.

[33] In *Ngui Yu Thau v Wong Mu Khyun & Ors* [2003] MLJU 106; [2003] 6 CLJ 273, where coincidentally, SD3 was the expert witness, Richard Malanjum J (as then was) held as follows at pp 284–285 (CLJ):

> Having considered the testimony of PW1 as a whole in the present case I have no doubt of his expertise in the field he was called to give evidence. As such I have no reason not to accept his evidence pertaining to the authenticity of the disputed signatures. PW1 gave his reasons for coming to his conclusion and the final report that he prepared was duly admitted in evidence — exh P2. Meanwhile, the defendants failed to discredit those reasons or the method adopted in coming to his conclusion. It is also noted that the defendants deemed it unnecessary to call their own expert witness to counter this evidence of PW1... On a balance of probabilities the plaintiff had proved the disputed signature to the product of forgery... and that the attesting signatures to the disputed signature were also forged.

EVIDENCE OF PERSON ACQUAINTED WITH THE PLAINTIFF'S SIGNATURE

[34] Although SP2 (the plaintiff's secretary) testified that she did not prepare

exhs D1–D2, she however had acknowledged in cross-examination that the signatures on exhs D1–D2 'looks like the signature' of the plaintiff.

[35] SP2 had testified that she is familiar with the plaintiff's signature, being his secretary, her evidence on the said letters is and admissible under s 47 of the Evidence Act in dispelling any notion that the signatures on the said letters were not the plaintiff's.

[36] Section 47 provides:

> When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to have been written or signed, that it was or was not written or signed by that person, is a relevant fact.

SIMILAR MANNER OF TRANSACTIONS IN THE PAST

[37] The plaintiff had on several occasions prior to the said transfers, given instructions to the bank in a manner similar to the instructions leading to the said transfers, ie transfer from the plaintiff's personal account to the accounts of companies associated with the plaintiff, including Handee's, via verbal instructions to the bank and subsequently confirmed by letters issued by the plaintiff to the bank.

[38] The plaintiff had agreed that he had on 1 February 1996 and 5 September 1996 verbally instructed the bank to transfer certain sums from his personal account to Handee's account as shown in the debit and credit notes/advise, which was subsequently confirmed by his letters dated 1 February 1996 and 5 September 1996 to the bank — see pp 21, 22, 23 and 25 of bundle B and exhs 6A–6B.

[39] The practice or convention, which had been mutually accepted by the plaintiff and the bank, would estop the plaintiff from denying having issued the verbal instruction and the said exhs D1–D2.

[40] In *Masjaya Trading Sdn Bhd v Kedah Cement Sdn Bhd* [2004] 4 CLJ 18, the Court of Appeal had cited with approval the doctrine of estoppel by convention by Lord Steyn in *Republic of India and another appellants v India Steamship Co Ltd (No 2)* [1998] AC 878 at p 913 as follows (at p 31):

> It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.

A WAIVER AND ESTOPPEL

[41] Although the plaintiff had received the monthly bank statement of account in respect of his personal account for the period from 16 December 1996 to 15 January 1997 (exh D9), which shows the debits of RM3,277,122.92 and RM1,484,236.56 the plaintiff conceded that he did not notify the bank of the alleged unauthorised debits within 21 days of the date of the said statement of account, as stipulated under cl 9 of the terms and condition of the plaintiff's personal account, 'failing which no liability of any form wil be attached to the Bank'. As such the plaintiff is stopped from denying having authorised the said transfers. The plaintiff is deemed to have waived his rights to do so.

[42] The plaintiff only complained about the alleged unauthorised transfer some 3 1/2 years after the said transfers through his solicitor's letter dated 1 July 2000 (see p 158 of bundle B). That complaint too was following the bank's letter dated 5 June 2000 (exh D13) wherein the plaintiff was given time until 30 November 2000 to settle the entire outstanding amount owing by him to the bank.

[43] In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the appellant received from the respondent invoices of Chemitrade bearing upon them the rubber stamped indorsement specifying the 14 day limit for objections. The appellant at that stage had a choice. It could have told the respondent that the 14 day limit was not part of the original arrangement, that this amounted to an abrogation of its rights and that it was not prepared to be bound by the limitation. But it did nothing of the sort. It did not merely remain silent. It actually made payments on those very invoices without any protest. It was held by the Federal Court that (at p 348):

> A reasonable man similarly circumstanced as the respondent would have been entitled to assume, as the respondent did, that the appellant was agreeable to the imposition of the 14 day limit. Influenced — and we use that term deliberately — by the conduct of the appellant, the respondent paid out on those very invoice. This the respondent would not have done had the appellant protested. The appellant's attempt to raise this point some seven months later, well after the respondent had paid out its money to Chemitrade, must, in our judgment be classified as unconscionable and inequitable conduct. Its ought not, therefore, to be permitted to question the validity of the indorsement.

[44] In *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, the appellant delivered a defence in which it denied a sub-agency. It was held by the Court of Appeal that (at p 237):

> A party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.
>
> ...
>
> A reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.

[45] And at p 238:

> We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.
>
> To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having does so, it ought not to be permitted to now contend otherwise.

CONCLUSION

[46] The alleged loss is not for a few thousand but more than RM4m that could not easily escape the plaintiff's attention. The plaintiff's conduct here in not doing anything for 3 1/2 years is very unreasonable and not of a prudent man.

[47] For the reasons stated above, I hold that the plaintiff had failed to establish his allegation that the defendant had without his instructions or approval effected the said transfers. Consequently, the plaintiff's claim is dismissed with costs.

THE COUNTERCLAIM

[48] The defendant's counterclaim against the plaintiff is for the recovery of the outstanding balance due under the overdraft and term loan facilities granted to the plaintiff.

[49] The plaintiff's contention is that the defendant's counterclaim is a charge action within O 83 r 1(1) of the RHC and that there should only be a claim for any deficiency arising from the proceeds of sale.

[50] In reply, learned counsel for the defendant submitted that the defendant's foreclosure proceedings under O 83 r 1(1) of the RHC against the plaintiff to enforce the security documents vis-a-vis Penang High Court Originating Summons No 24–1057 of 2002 is distinct from the civil proceedings herein. The defendant is entitled to commence civil action for the recovery of the outstanding balance due under the overdraft and term loan facilities granted to the plaintiff, and to institute concurrently, a foreclosure action to enforce any of the security document, so long as there is no duplicity between the civil action and the foreclosure action.

[51] To further support his argument the said learned counsel cited section 14.02 — Rights of Bank on default, of the facilities agreement (at p 81 of bundle B) which provides that in the event of default:

> ... the Bank shall be entitled forthwith to take such action as may be appropriate against the Borrower and (plaintiff herein), including action to sue and institute by way of civil suit for the recovery of the Indebtedness either before, after or concurrently with the action to enforce any of the Security Documents and to apply any credit balance standing to any account of the Borrower with any office or branch of the Bank … towards the satisfaction of the Indebtedness.

RULING

[52] It is trite that the defendant is entitled to bring the counterclaim against the plaintiff in the proceedings herein having regard to O 15 r 2 of the RHC and in order to avoid multiplicity or circuitry of suits.

[53] Order 15 r 2 of the RHC 1980 provides that:

> Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a Plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter, and where he does so he must add the counterclaim to his defence.

[54] In *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157; [1985] CLJ (Rep) 242 the Federal Court held that (at p 161 (MLJ); p 248 (CLJ)):

> A counterclaim on the other hand is also a cross-claim which a defendant has against a plaintiff but in respect of which the defendant can bring a separate action against the plaintiff if he wishes to do so. Thus, to all intents and purposes a counterclaim is a separate and independent action by the defendant, which the law allows to be joined to the plaintiff's action in order to avoid multiplicity or circuitry of suits.

[55] The right of the bank had also been discussed recently by the Federal Court in *Chan Boi Loi v Public Bank Berhad* [2009] MLJU 733; [2009] 6 CLJ 81, where it was held that (at p 91 (CLJ)):

> A lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary.

OUTSTANDING CLAIM

[56] The plaintiff had acknowledged in cross-examination that he had in 1999 failed to settle the outstanding in respect of the overdraft facility and the monthly installments despite several requests and reminders.

[57] The bank had by the letter dated 17 June 1999 issued by their solicitors, requested the plaintiff to remedy his breach and to make payment within seven days, a total sum of RM1,536,633.97, ie RM1,292,158.97 being the amount outstanding under the said overdraft facility and RM244,485 being the amount outstanding under term loan facility as at 15 June 1999 together with interest thereon, which letter the plaintiff had acknowledged receipt — see bundle B, pp 132–134.

[58] The plaintiff had conceded in cross-examination that he paid an aggregate sum of RM674,275 to the bank towards settlement of the outstanding sums due to the bank, which the bank had accepted on a without prejudice basis (see exhs D10, D11 and D12).

[59] The plaintiff also acknowledged in cross-examination that upon the plaintiff's request, the bank had vide their letter dated 5 June 2000 (exh D13) extended indulgence to the plaintiff on a without prejudice basis to fully settle the balance amount due under the said overdraft facility by 30 November 2000 and to service the monthly interest on the said facility regularly and promptly, and to continue servicing the monthly repayment of RM22,225 on the said term loan facility until the facility is fully settled.

[60] The above facts are clear admission of debt and default of debt by the plaintiff.

[61] The plaintiff then contended that the counterclaim does not reflect that the bank had sold off the plaintiff's share in December 2001 and January 2002 as well as the plaintiff's property in July 2004.

[62] In this regard and as testified by SD2 and as reflected in the statements of accounts, the following transactions had taken place since the filing of the

bank's defence and counterclaim dated 13 March 2001, and that the defendant had taken into account, when calculating the plaintiff's indebtedness to the defendant as at the date of the trial, ie on 26 May 2010, the following, namely:

(a) the sale of share in December 2001 for a sum of RM452,401.74 and RM447,478.88 — see p 2 of bundle F;

(b) the sale of the remaining shares in January 2002 for a sum of RM1,064.16 — see p 3 of bundle F; and

(c) the proceeds from the auction sale of the plaintiff's property, ie 363–0, Jalan Pemancar, Penang erected on Lots 914 and 915, Town of Gelugor, NED Penang on 28 July 2004 at a sum of RM1,780,000 in respect of the foreclosure proceedings under Penang High Court Originating Summons No 24–1057 of 2002 — see p 4 of bundle C.

[63] The plaintiff had agreed in cross-examination that he was aware of the foreclosure proceedings, and that the sale proceeds from the auction had been used to reduce the amount owing by the plaintiff to the bank.

[64] In the circumstances, the indebtedness of the plaintiff to the defendant as at the date of trial on 26 May 2010 stands in the aggregate sum of RM4,168,161.49 ie RM1,976,328.86 being the amount outstanding under the said overdraft facility and RM2,191,832.63 being the amount outstanding under the term loan facility, as set out in the certificate of indebtedness dated 25 May 2010 (see p 3 of bundle C) and in the statement of accounts (see pp 1–14 of bundle F and pp 4–27 of bundle C).

[65] It is pertinent to note that the evidence of SD1 and SD2 on the indebtedness of the plaintiff to the bank had not been challenged, and is thus deemed admitted by the plaintiff. The plaintiff also had not raised any doubt as to the veracity of the certificate of indebtedness and the statement of accounts, neither of which had been challenged whether in respect of any manifest error or otherwise.

[66] Quite apart from the fact that the plaintiff is bound by section 15.15 of the facilities agreement in respect of the certificate of indebtedness, the said certificate and the statements of accounts stand undisputed and are therefore conclusive evidence of the plaintiff's liability to the defendant for the sums as claimed.

[67] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 held that:

A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing the proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim.

In the instant case, the relevant cll 27 and 7.03 of the loan agreement and guarantee agreement respectively were sufficiently clear. A clause of this nature has been described as a conclusive evidence clause. Such a clause has been held to be binding and valid by courts in Australia and England.

The certificate of indebtedness exh P3, issued in accordance with the aforesaid cll 27 and 7.03 aforesaid, are lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown.

[68] Whether there is a need to amend the statement of claim to account for the difference between the amount claimed and the amount to be signed in the judgment, the Supreme Court in *Krishnamurthy & Anor v Malaysian Finance Corporation Bhd* [1986] 2 MLJ 134 at p 135 held that:

As regard the objection to the difference between the amount claimed and the amount to be signed in the judgment … the matter was fully explained by the respondents to the effect that credit had to be given for the value of cars which the respondents repossessed between the date of the writ and the date of the summons in chambers. There was no need to amend the statement of claim for the making of the adjustment.

[69] The High Court had in *Danaharta Urus Sdn Bhd lwn Zabia Sdn Bhd & 4 yang lain* [2009] 1 LNS 1212, entered judgment in favour of the plaintiff in the sums as set out in the certificate of indebtness, which had taken into account all payments received by the plaintiff since the commencement of the action, and that the difference in the ultimate outstanding sum claimed and that in the statement of claim had been explained by the plaintiff.

CONCLUSION

[70] The ultimate sum claimed by the defendant against the plaintiff had been clearly accounted for in the certificate of indebtedness and the statement of accounts. Accordingly, judgment entered against the plaintiff in the sum of RM4,168,161.49 for the balance due under the overdraft and the term loan facilities and interest as claimed to the defendant to be taxed unless agreed.

Plaintiff's claim dismissed and defendant's counterclaim allowed with costs.

Reported by Kanesh Sundrum